IN THE

Supreme Court of the United States

OCTOBER TERM 1948

No. 608

CAPITAL AIRLINES, INC., *Petitioner*

against

CIVIL AERONAUTICS BOARD, *Respondent*

PETITION OF CAPITAL AIRLINES, INC., FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

and

SUPPORTING BRIEF

CHARLES H. MURCHISON
Attorney for Petitioner,
Capital Airlines, Inc.

STOCKTON, ULMER & MURCHISON
1016 Ring Building
Washington 6, D. C.
Of Counsel

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITION OF CAPITAL AIRLINES, INC., FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The petitioner, Capital Airlines, Inc., respectfully shows to this Court:

STATEMENT OF THE MATTER INVOLVED

Petitioner is an air carrier engaged in transporting persons, property and mail by aircraft in the United States under certificates of public convenience and necessity issued to it by the respondent, Civil Aeronautics Board, un-

der the Civil Aeronautics Act of 1938, as amended (52 Stat. 977 ff., 49 U. S. C. §§ 401-680).[1]

Under the terms of the Act, Capital, like all other existing air carriers, was compelled to obtain such a certificate as a condition to remaining in business. The Act compelled Capital to transport the mails and to render other services to the Government required for the commerce of the United States, the Postal Service, and the national defense. The only machinery provided by the Act for the ascertainment and payment of just compensation for these compelled services was that created by Section 406 (a).

Section 406 (a) of the Act empowers and directs the Board, upon its own initiative or upon petition of the Postmaster General or an air carrier, "to fix and determine from time to time, after notice and hearing, the fair and reasonable rates of compensation for the transportation of mail by aircraft . . . by each holder of a certificate authorizing the transportation of mail by aircraft, and *to make such rates effective from such date as it shall determine to be proper. . .*" In determining a fair and reasonable rate and the proper date from which it should be effective, the Board was directed to consider the need of a carrier for compensation sufficient to insure the performance of *all* of the compelled services.

On October 8, 1940, the Board instituted a proceeding to determine the fair and reasonable rate of compensation to be received by Capital for the period beginning October 9, 1940. While the proceeding was pending, Capital, on

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[1] In this petition and accompanying brief the Civil Aeronautics Board and its predecessor, the Civil Aeronautics Authority, will be called the "Board". The Civil Aeronautics Act of 1938 (Act of June 23, 1938, c. 601, 52 Stat. 977 ff., 49 U. S. C. § 401-680) will be called the "Act". Petitioner will be called "Capital". In the proceeding before the Board Petitioner was called "Pennsylvania-Central Airlines Corporation". Its corporate name has since been legally changed to Capital Airlines, Inc., and its certificates of public convenience and necessity reissued in the new name.

All italics are ours unless otherwise specified.

Numerical references in parentheses refer to pages of the Record filed with this Court.

June 26, 1942, filed a petition therein representing that on account of the uncertainty of future events and conditions resulting from a state of war it was impossible to fix a rate for the future which would have any likelihood of being fair and reasonable, and requesting that the rate to be fixed for the period beginning June 1, 1942 be made tentative and subject to future review and reconsideration. (7-10) Within a few weeks prior to the filing of said petition, the Board had found, on its own initiative, as expressed in Memoranda to the Presidents of the air carriers dated May 22nd and June 3rd, 1942, that:

> "Because of the uncertainties inherent in the present situation . . . it is *not feasible* to fix fair and reasonable rates for the future on the information presently available. . ." (115)

and that:

> "It is recognized that the forecasting of the future under existing circumstances is extremely difficult, if not impossible." (119)

On December 16, 1942, the Board entered an order fixing a mail rate to determine the compensation to be paid Capital for services rendered during the past period from October 9, 1940 to May 31, 1942 and also a rate to be paid for the future period beginning June 1, 1942. The order stated that in accordance with Petitioner's request above mentioned, the rate to become effective as of June 1, 1942 would be subject to reconsideration and review from and after that date upon Petitioner's request filed pursuant to Rule 8 of the Board's Rules of Practice. (4 C. A. B. at 25)

In accordance with the procedure prescribed in said order, Capital filed a petition with the Board on January 14, 1947, representing that the amount of pay it had received for services rendered subsequent to June 1, 1942 had fallen about $5,000,000 short of equalling just compensation for said services and requesting the Board to reconsider and increase the rate for the period in question. (11-108)

The Board declined to consider on its merits the question whether Capital had received, or was entitled to, just compensation for its services rendered since June 1, 1942, and held that it had no power to reconsider or adjust the rate fixed by the order of December 16, 1942. Accordingly, the Board dismissed Capital's petition, one Board member dissenting. (134-180)

On petition for review, the action of the Board was affirmed by the Court of Appeals for the District of Columbia Circuit on December 6, 1948. (171 F. (2d) 339; 181).

JURISDICTIONAL STATEMENT

This Court has jurisdiction to review the judgment and decree of the United States Court of Appeals for the District of Columbia Circuit by virtue of the following statutory provisions: 28 U. S. C. § 1254 (see Pub. L. 773, 80th Cong., 2nd Sess. ch. 646), and § 1006 (f) of the Civil Aeronautics Act of 1938 (52 Stat. 1024; 49 U. S. C. § 646 (f)).

THE QUESTIONS PRESENTED

1. Is Capital entitled, under the Fifth Amendment to the Constitution of the United States, to be paid just compensation for the services it was compelled to render to the United States by the Civil Aeronautics Act?

Despite the fact that the affirmative answer to this question is elementary and basic under our system of Government, the effect of the decision below is to deny it. It is admitted for the purposes of this case that the mail rate in effect on and prior to January 14, 1947 failed by millions of dollars to provide just compensation for the services rendered. Yet the Court of Appeals held that the Constitutional obligation is fulfilled by a statute which, as interpreted by it, "embodies a *scheme* of just compensation" (by providing a determination of what is thought to be just compensation in advance of performance rather than after performance) notwithstanding that the "scheme" fails to pro-

vide just compensation in fact. Any "scheme" which irrevocably substitutes false prophecy for fact is a mockery of the obligation to pay just compensation.

2. Was it the intent of Congress, as expressed in the Act, to delegate to the Board the power to discharge the whole Constitutional duty of awarding just compensation by fixing the mail rate from time to time and determining the date from which such rate should be effective?

To sustain the Constitutional validity of the Act it is necessary that just compensation in fact be recoverable by Petitioner either from the Board or in the Court of Claims. Just compensation for the past services is a constitutional right no less than it is for the future. Since the compensatory statute here involved is broader in scope than the Railway Mail Pay Act of 1916, the obvious and manifest intent of Congress to refer all the rights of the carriers for settlement to the Board is even more apparent than this Court found in the previous Act. *United States* v. *New York Central R. Co.*, 279 U. S. 73 (1929). No more reason can have existed in the present instance for leaving the satisfaction of those rights to an action in the Court of Claims rather than in the jurisdiction of the body specially qualified to measure the rights.

3. Where the Board has fixed a mail rate for a future period, based upon predicted facts, and such future period has passed so that the actual facts can be ascertained, which show that the rate so fixed has failed to yield just compensation, does the Board have the power under the Act to reconsider and adjust the rate for the past services to the extent required to provide just compensation?

The failure of the Board and of the Court below to answer this question in the affirmative resulted from the application of concepts properly applicable to the fixing of rates as between public utilities and their cus-

tomers. Here, however, we are dealing with the payment of just compensation for compelled services. Concepts applicable to other public utilities have no proper application here. The services of public utilities are not compelled and the Constitution does not guarantee them rates which afford just compensation. Public utility rate regulation, as recently recognized by this Court in the *Hope* case, is an exercise of the police power, a species of price fixing, involving "a balancing of the investor and the consumer interests". *Federal Power Comm.* v. *Hope Nat. Gas. Co.*, 320 U. S. 591. The Fifth Amendment does not enter into the picture until the rates are attempted to be fixed so low as to confiscate the property of the investors or according to the Courts, so low as to deprive the investors of the *opportunity* to earn a reasonable rate of return. In the case of compelled services, fundamentally involving the power of eminent domain, the Fifth Amendment operates *from the beginning*. The difference between rate regulation cases and just compensation cases is fundamental.

4. If the power to reconsider and increase a mail rate for a past period does not exist in every case when the actual facts disclose that the rate has failed to provide just compensation, does not the Board have such power at all events in this particular case in which the order fixing the rate expressly provided that it was subject to reconsideration and review from and after its effective date?

The rate order sought to be modified here expressly provided that it would be subject to reconsideration and review from and after June 1, 1942 upon Capital's request "filed pursuant to Rule 8 of the Rules of Practice". (4 C. A. B. at 25) Capital contended below that this provision had the effect of making the rate tentative or provisional only and therefore subject at any time to ex post facto modification. Both the Board

and the Circuit Court of Appeals conceded that the Board had the *power* to prescribe such a provisional rate, but the Board, supported by the Court, held that the reference to Rule 8 limited the provisional character of this rate to a period of 15 days after the entry of the order. The 15-day period was specified by Rule 8, among many other things, as the time within which petitions for rehearing should be filed by parties to a proceeding. The Court below, in its opinion, completely ignored Capital's argument that such a self-imposed rule of practice could affect neither the *power* of the Board to disregard it when necessary in the discharge of its constitutional duty nor its *duty* to do so, particularly when the rule was only a limitation on the time within which a *party* might file a petition and not a time limitation on the Board's statutory power on its own initiative under Section 1005 to suspend or modify its orders in such manner as it shall deem proper.

REASONS FOR ALLOWANCE OF THE WRIT

1. Questions 1, 2 and 3 above stated are involved in the case of *Transcontinental & Western Air, Inc.* v. *Civil Aeronautics Board,* Docket No. 387, in which this Court granted certiorari on December 6, 1948 and in which counsel for Petitioner filed a brief as *amicus curiae.* Should this petition be denied and this Court thereafter render a decision in favor of the carrier in Docket No. 387, Petitioner will be deprived of substantial rights to which it is entitled under the Constitution and Laws of the United States.

2. The Court of Appeals for the District of Columbia Circuit has not given proper effect to an applicable decision of this Court. The decision of this Court in the case of *United States* v. *New York Central R. Co.,* 279 U. S. 73, if given proper effect, would have required said Court to hold that the Board had the power to increase Petitioner's mail rate for the past period in question.

3. Said Circuit Court of Appeals has decided important questions of federal law which have not been, but should be, settled by this Court.

These reasons are discussed in Capital's attached brief.

WHEREFORE, your Petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Court of Appeals for the District of Columbia Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Court of Appeals had in the case numbered and entitled in its Docket No. 9870 (October Term 1948), *Capital Airlines, Inc., Petitioner* v. *Civil Aeronautics Board, Respondent*, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the order of said Court of Appeals be reversed by this Court.

CHARLES H. MURCHISON
Attorney for Petitioner,
Capital Airlines, Inc.

STOCKTON, ULMER & MURCHISON
1016 Ring Building
Washington 6, D. C.
Of Counsel

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BRIEF OF CAPITAL AIRLINES, INC. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The decision of the court below is reported at 171 F. (2d) 339 and also appears in the Record before this Court. (181)

The statement of this Court's jurisdiction, and the statement of the case, have already been set forth in the attached petition for writ of certiorari.

SPECIFICATION OF ERRORS

1. The Court of Appeals erred in holding that the power to make a mail rate effective from a date prior to the institution of a new mail rate proceeding "is not needed to vindicate the Constitutional requirement for just compensation (Fifth Amendment) . . .".

2. The Court of Appeals erred in holding that the right to just compensation is "protected by the privilege accorded carriers to apply at any time for higher rates to compensate for *future* service to the Government".[1]

3. The Court of Appeals erred in holding that the Board order of December 16, 1942, fixed a final rather than a temporary mail rate for Capital Airlines.

4. The Court of Appeals erred in holding that Capital's right to reconsideration was lost by failure to apply therefor within fifteen days from the date of the 1942 order.

5. The Court of Appeals erred in holding that the Board was without power to revise Capital's rates retroactively.

SUMMARY OF ARGUMENT

Decisions of this Court are at striking variance with the reasoning of the court below which held that the right to just compensation is "protected by the privilege accorded carriers to apply at any time for higher rates to compensate for *future* service to the Government." On the contrary, *just compensation* by its very nature is a *retrospective* concept. It can only be determined after all the facts upon which it depends become known. "A forecast gives us one rate. A survey gives another. To prefer the forecast to the survey is an arbitrary judgment." *West Ohio Gas Co.* v. *Public Utilities Comm.*, 294 U. S. 79. A mail rate established for the future *may* turn out to be "just compensation", but then again, it may turn out to be confiscatory five minutes after it has been established. *Des Moines Gas Co.* v. *Des Moines*, 238 U. S. 153.

Capital's constitutional right to just compensation in this case will not be vindicated unless the Board is ordered to go back beyond January 14, 1947, the date of Capital's petition, and make adequate payment for the services ren-

[1] Italics supplied unless otherwise noted. Footnote 1 on page 2 of the attached petition is applicable to this brief.

ered by Capital to the Government. The right to receive ayment for past services requisitioned by the Government tands on a different basis from the right of ordinary pub- c utilities to retroactive adjustment of rates fixed in the xercise of the police power—a right which they have never laimed.

Capital has never waived its Constitutional right to the ayment of just compensation for the past services. The oard frequently makes retroactive adjustments of mail ates previously fixed under the Act and does not question ts power to do so. The Board's Order of December 16, 942 expressly made the rate provisional and reserved urisdiction to revise it retroactively. Rule 8 of the Board's ules of Practice did not deprive it of this jurisdiction.

POINT I

To discharge the full obligation of the Fifth Amendment the Board must have the power to raise an existing rate retroactively

In the pending *TWA* case the Court of Appeals for the District of Columbia affirmed the Board's decision that he Board is without power to revise rates retroactively rior to the date a mail rate case is initiated. The same ule was applied by the Court of Appeals in Capital's case fter the Court had decided that Capital had lost its right o reconsideration by failure to apply therefor in time. On he question of the Board's *power* to grant retroactive ad- ustments the *TWA* case and Capital's case are identical. n the facts they are not similar.

The Court in TWA's case dealt only with the statutory ower of the Board under Section 406 (a) of the Act to nake mail rates effective prior to the date of the institu- ion of a proceeding. The effect of the Fifth Amend- nent on the interpretation of the Act was not considered y the court below. Actually, the Fifth Amendment is lecisive on the question of the power of the Board to go

back into the past in determining just compensation. In Capital's case, the Court below lost sight of the Constitutional principle through confusing a mail rate (which is actually a measure of compensation for requisitioned services) with a rate fixed under the police power to be charged to the public.

The reasoning of the Court below, that the right of air carriers to just compensation "is protected by the privilege accorded carriers to apply at any time for higher rates to compensate for *future* service to the Government", is patently unsound. The privilege to obtain a new estimate only of what will be fair under conditions prophesied for the *future* simply ignores the quantum meruit for services already rendered. Yet the quantum meruit for carrying the mail, which can never be determined except retroactively, is what this Court has said in *United States* v. *Griffin*, 303 U. S. 226, is "the ultimate question" to be determined in a mail pay case. This Court has held more than once that without the test of experience it could not even tell in advance whether an ordinary public utility rate is *confiscatory*. *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19; *City of Louisville* v. *Cumberland T. & T. Co.*, 225 U. S. 430.

Rate-fixing for the future does not constitute a determination of just compensation, which is essentially a judicial determination. Rate-fixing for the future is a legislative process. It may or may not result in just compensation. In a period of constantly rising costs, no matter how frequently *prospective* increases may be granted, there will always be a period of service for less than just compensation unless the increases are made retroactive.

Where services are rendered to the Government under compulsion, just compensation must be provided for in order to save the constitutionality of the statute. Since the Civil Aeronautics Act, on its face, makes the Board the sole agency to compensate the carriers for their services to the Government, the Constitution requires the Act to be construed in a way which will provide the just compensation which the Board in this case has denied.

In *United States* v. *New York Central R. Co.*, 279 U. S. 73 (1929), the Government conceded (and this Court held) that since the services of the railroads were required, the obligation to pay just compensation was a constitutional right. This right included payment for *past* services as well as future. This Court further held that, since the Interstate Commerce Commission was the sole agency to which the railroads were referred for payment, Congress necessarily intended to vest the Commission (rather than the Court of Claims) with power to award for past services the just compensation which had not theretofore been determined and paid.

No one can seriously contend that, because the Act, when enacted, required Capital to go through the form of making an "application" for a certificate of public convenience and necessity under penalty of destruction of its business (Capital had been carrying mail many years before the passage of the Act and obviously wished to continue doing so), that its submission to the obligations of the certificate was "voluntary", or that its services were any less compulsory than were those of the railroads in the *New York Central* case.

Both the Board and the Court of Appeals below confused mail rates with regulated rates of ordinary public utilities. Both were misled by the use of the term "rate" as a measure of compensation in the Act. In *United States* v. *Griffin*, 303 U. S. 226, this Court ruled that mail pay is not a "rate" at all, but a measure of just compensation for services rendered to the Government:

> "While the compensation fixed in a railway mail pay order is ordinarily *measured* by a rate, the ultimate question determined by the Commission is . . . the proper compensation to be paid by the Government to the Railroad for services and the use of its property—*the quantum meruit for carrying the mail.*" (303 U. S. at 237)

In regulating rates charged by public utilities or carriers to their customers, the State is exercising the police power,

primarily to prevent extortion from the public. The Courts are not concerned with whether or not the rate is sufficient to provide just compensation for services rendered, but only with the question whether the rate is *confiscatory*. In exercising the power of eminent domain, elements of value must be considered which may be ignored in rate cases. The distinction between ascertaining value in a compensation case and a rate case was pointed out in *Omaha* v. *Omaha Water Co.*, 218 U. S. 180. There is a difference between just compensation and a non-confiscatory rate. "The mere fact that a rate is non-confiscatory does not indicate that it must be deemed to be just and reasonable". *Banton* v. *Belt Line Ry. Corp.*, 268 U. S. 413. *A non-confiscatory rate may ignore past confiscation, just compensation may not.*

With reference to the police-power regulation of rates, this Court recently said in the case of *Market Street R. Co.* v. *Railroad Comm. of California*, 324 U. S. 548:

> "The due process clause has been applied to prevent governmental destruction of existing economic values. It has not and cannot be applied to *insure* values or to restore values that have been lost by the operation of economic forces".[1]

This principle has no application to a just compensation statute which directs the Board to fix the compensation at an amount "sufficient to *insure* the performance" of the service and to "maintain and continue the *development*" of the required air transportation. The Government cannot develop air power for an atomic war by requiring the performance of a three-fold service (as here) and, thereafter, attempt to compensate for such service by establishing compensation in the form of a rate which turns out to be far short of "just compensation".

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[1] In *Block v. Hirsh*, 256 U. S. 135 at 155, this Court held that under the doctrine of eminent domain "what is taken is paid for," but under the police power "property rights may be cut down, and to that extent taken without pay."

In the *New York Central* case this Court found sufficient compulsion in the Railway Mail Pay Act (Sec. 5, Subd. 33, 39 Stat. 431, 39 U. S. C. 563) to invoke the carriers' constitutional right to just compensation. That statute provided for a fine of $1,000.00 a day for refusal to carry the mails. The Civil Aeronautics Act specifies even more severe punishment for any carrier failing to furnish the necessary schedules and services for the Government. In the recent *Alaska Airlines* case the Board restated the compulsions imposed upon carriers by the Act and actually gave the very relief demanded by Capital in this case. The Board stated:

> "Certificates of convenience and necessity carry with them many obligations imposed by law. Section 401(m) requires a carrier certificated for mail service to carry mail whenever required by the Postmaster General. Section 404(a) states in part that 'it shall be the duty of every air carrier to provide and furnish interstate and overseas air transportation, as authorized by its certificate, upon reasonable request therefor.' Section 401(k) forbids the abandonment of any route without previous approval by the Board, which approval may be given only upon a finding that abandonment is in the public interest. Failure to fulfill these and many other obligations are not matters to be compensated for by mere damages. Section 401(h) provides for suspension or revocation of certificates. Title IX imposes serious civil and criminal penalties . . ." (Opinion of the Board, Order Serial No. E-1885, August 13, 1948, p. 3.)

There is no question that Capital was likewise under compulsion to render multiple services to the Government, and consequently cannot be denied its constitutional right to just compensation unless there has been an "acquiescence" in the confiscatory rate. The general rule is that where a carrier is under an obligation to perform the service in question, no affirmative form of protest is necessary.

In *Chicago & Northwestern R. Co.* v. *United States,* 104 U. S. 680, the railroad continued to perform under its con-

tract with the Government to carry the mails even though Congress had passed a statute reducing the rate provided for in the contract. Subsequently, the railroad sued the Government for the difference between the contract rate and the statutory rate. On the question of waiver, this Court stated:

> "And the performance by the Railroad Company of the service required by its contract, notwithstanding the notice of the intended reduction by the Postmaster General, cannot be construed as a waiver of its rights or an acquiescence in new proposals; and that *whether it had protested against the erroneous construction of the law or not;* for it had no option. It was bound by the contract to perform the service and its performance was demanded. It was not in a position absolutely to refuse to carry the mails for it was bound to carry them, if offered, on some terms, either prescribed by law or fixed by contract; and it had the right to do so without prejudice to its lawful claims, leaving the ultimate right to future and final decision." (104 U. S. at 688)

Capital has never waived its right to additional compensation for the past period. The fact that the previously fixed rate "stood unchallenged for three years" does not establish a waiver. In the *Alaska Airlines* case, *supra,* the previous rate stood unchallenged for more than four years, but the Board did not consider this a waiver of the carrier's right. As stated in *St. Louis, Brownsville & Mexico R.* v. *United States,* 268 U. S. 169:

> ". . . to constitute acquiescence within the meaning of this rule, something more than acceptance of the smaller sum without protest must be shown. There must have been some conduct on the part of the creditor akin to abandonment or waiver, or from which an estoppel might arise. Every case in which this court has sustained the affirmative defense of acquiescence rests upon findings which include at least one of these additional features". (268 U. S. at 175)

In the present case, Capital challenged the ability of the Board to fix a compensatory rate for the future at the time

the rate was being fixed. The Board expressly conceded its inability to do so, and fixed the rate provisionally. There was no duty on Capital to make any further challenge to avoid an estoppel.

POINT II

The Board's power to revise its Order of December 16, 1942 was not lost by the elapse of 15 days

In many mail rate cases the Board fixes "temporary" rates which are subject to reconsideration and adjustment retroactively if, in actual experience, they do not yield just compensation. The Board did just that in the instant case for the period subsequent to January 14, 1947, and has since revised the rate upward in the light of experience. *Essair, Inc., Temporary Mail Rates,* 6 C. A. B. 687; *Chicago & Southern Air Lines, Inc.,* Order No. E-1097; and many others.

Capital in June, 1942 clearly asked for, and the Board's December, 1942 order clearly fixed, a rate for the future which was of the same provisional and temporary character. No other interpretation of the 1942 Order is legitimate. The Board itself stated that the rate for the period beginning June 1, 1942 was fixed:

> "... *in accordance with the specific request of the respondent that the rate to be applied subsequent to June 1, 1942, be made subject to review.*" (4 C. A. B. at 44)

The Board further said that the rate would be "subject to reconsideration and review from and after that date." (4 C. A. B. at 25) The conception that the addition of the words "upon respondent's request, filed pursuant to Rule 8 of the Rules of Practice", limited the time for review to an experience period of 15 days is a mockery of reason.

Even if the Board had intended to false-card Capital out of its *right* to file a petition for review of the provisional rate by inserting this 15-day joker in the pack, this would

not affect the Board's *power* to reconsider the order in its discretion. Power to reconsider its own orders is vested in the Board by Section 1005 (d) of the Act as follows:

> "Except as otherwise provided in this chapter, the Board is empowered to *suspend or modify* its orders upon such notice and in such manner as it shall deem proper."

There is no statutory time limitation placed on the Board's power to suspend or modify. Rule 8 was a limitation only on the right of a *party* to a proceeding to file a petition for reconsideration, and the Board has waived this time limit in many, many cases upon request of a party. The Board has never adopted any rule purporting to limit the time within which it may act *on its own motion* to modify an order. If it has the power to reconsider and revise its orders on its own motion, it also has the *power* to act when the need for revision is called to its attention by an unauthorized petition.

In *Froeber-Norfleet* v. *Southern Railway Co.*, 9 F Supp. 409 (D. C. N. D. Ga.), a reversal on rehearing of a reparation order was involved. The Interstate Commerce Commission first entered an order sustaining the challenged rates on December 9, 1929. Several petitions for rehearing were filed and were denied. Finally in August, 1931, an additional petition for reconsideration, modification and reopening was filed and on November 3, 1931, the Commission ordered the proceedings reopened and, thereafter, entered an Order finding the rates unreasonable and awarding reparation. Section 16 (6) of the Interstate Commerce Act, like Section 1005 (d) of the Civil Aeronautics Act, provides "the Commission shall be authorized to suspend or modify its orders upon such notice and in such manner as it shall deem proper." The Commission had adopted its Rule 15 (e), which provided that a petition for rehearing a case relating to reparation must be filed within sixty days after service of the report.

In the *Froeber* case the court observed that the limitation of the Rule was upon the filing of a petition by a party and not upon the Commission itself, and that the Commission had not imposed any time limit upon itself for the reopening and reconsideration of a case. The court then held that the Commission had the power to reconsider the case even though the time limit fixed by Rule 15 (e) had expired. The court said:

> "The Commission may properly, under its Rule 15 (e), deny a party the right to file a petition for rehearing in a reparation case unless it be presented within sixty days, but I do not see anything in this Rule to prevent the Commission, on its own Motion, from reconsidering and reversing or modifying one of its Orders, whether the matter be brought to its attention by *a petition which a party could not file as a matter of right*, or in some other way." (9 F. Supp. at 411)

Even if the Board had attempted (which it did not) to limit the time within which it could, on its own motion, reconsider and modify its orders, it could not by any such self-imposed rule, disable itself from performing its statutory duties. In *Gage* v. *Gunther*, 136 Cal. 338, 68 Pac. 710, the pertinent facts are stated by the court as follows:

> "The proposition chiefly relied upon by them is that the denial of Secretary Noble, on March 3, 1893, of the motion to review his decision of August 1, 1892, reversing the decision of the commissioner of the general land office, was a final determination of that question; . . . and that Secretary Smith had no jurisdiction thereafter to review the same; and in support of this claim they rely upon certain rules of practice or procedure formulated by the land department, under which it is claimed that a re-review of a decision by the secretary is unauthorized." (136 Cal. at 345)

In holding that no self-imposed rule of practice could limit the time within which the former decision might be reconsidered, the court said:

"Neither can the authority of the secretary to review or set aside the decision be taken away by any rule of procedure which he may formulate. There is no statutory inhibition against his granting a rehearing or a review, or the number of times a motion therefor may be made, or any provision relating to the time within which a rehearing may be granted, or within which the former decision may be set aside. Congress has imposed this supervisory duty upon him, and he cannot divest himself of it by any rule of his own creation." (136 Cal. at 347)

CONCLUSION

The petition for a writ of certiorari should be granted.

CHARLES H. MURCHISON
Attorney for Petitioner,
Capital Airlines, Inc.

STOCKTON, ULMER & MURCHISON
1016 Ring Building
Washington 6, D. C.
Of Counsel

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CITATIONS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE CIVIL AERONAUTICS BOARD

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (R. 181-182) is reported at 171 F. 2d 339. The opinion of the Civil Aeronautics Board (R. 132-180) is reported at 8 C.A.B. (No. 52) 685.

JURISDICTION

The judgment of the Court of Appeals was entered on December 6, 1948 (R. 183). The petition

for a writ of certiorari was filed on February 28, 1949. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Whether the Civil Aeronautics Board has authority, under the Civil Aeronautics Act, to fix a new mail rate to be effective during a period in which a final rate previously fixed by the Board was in effect and unchallenged by the initiation of a mail-rate proceeding.

2. Whether the Civil Aeronautics Board abused its discretion or denied petitioner any legal right in determining that the petitioner's January 14, 1947, "Petition for Reconsideration" of the Board's order of December 16, 1942, initiated a new rate proceeding rather than serving to reopen the old proceeding which culminated in the 1942 order.

STATUTE AND REGULATION INVOLVED

Section 406 of the Civil Aeronautics Act and Rule 8 of the Civil Aeronautics Board's Rules of Practice are set out in the Appendix, *infra*, pp. 9-12. Other relevant statutory provisions are set out in the Appendix to the Board's brief in *Transcontinental & Western Air, Inc.* v. *Civil Aeronautics Board*, No. 387, this Term.

STATEMENT

On October 8, 1940, the Board instituted a proceeding to fix and determine fair and reasonable

mail rates for the petitioner (referred to hereinafter as Capital) pursuant to Section 406(a) of the Civil Aeronautics Act of 1938. After public hearing, an Examiner issued his report recommending the establishment of certain mail rates for Capital (R. 11-12; *Pennsylvania-Central Airlines Corporation, Mail Rates,* 4 C.A.B. 22, 23-24 (1942)). In May 1942, the armed forces took over a substantial portion of the planes of the domestic air carriers, and severe restrictions affecting service patterns of all carriers, including Capital, were imposed (R. 137, n. 4; 12, 114, 115, 118). To protect carriers against undue losses occasioned by these restrictions, the Board issued two general memoranda to the industry (R. 137, n. 4). The first memorandum suggested that all mail rates fixed after May 31, 1942, be temporary. The second memorandum expressly withdrew the first and provided that any carrier which had no rate case pending could file a petition within two weeks after June 3, 1942, which petition would be considered filed as of June 1, 1942. If such a petition were filed, it was proposed that after sufficient experience had been accumulated under the new service pattern, a final rate effective as of the petition date, June 1, 1942, would be fixed. As to those carriers, like Capital, which had rate cases pending, the Board would proceed to fix final rates in accordance with its usual procedure. (R. 114-117, 118-119.) On June 26, 1942, Capital filed a petition with the